IN THE

Supreme Court of the United States

October Term, 1975

No. 75-881

RICHARD HOOBAN, *Appellant Pro Se,*

v.

BOARD OF GOVERNORS OF THE WASHINGTON STATE BAR ASSOCIATION, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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SUBJECT INDEX

TABLE OF AUTHORITIES

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The appellee moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of the State of Washington on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument

STATEMENT OF THE CASE

The bulk of appellant's statement is argumentative and appellee feels compelled to supplement appellant's statement of the case.

Appellant duly qualified for, and took the February 1974 bar examination in the State of Washington. The examination consisted of two parts: The first part being a two-day essay examination and the second part being the one-day multi-state bar examination. Appellant failed both portions of the bar examination. Subsequently, appellant requested an impartial regrading of his examination. Pursuant to appellant's request, a review committee composed of three members of the committee of law examiners, who did not participate in the February 1974 examination, were appointed. The review panel concluded that there was no basis for changing the total points given to the appellant for his answers on the essay examination. The multi-state portion of the examination was not reviewed.

The recommendation of the review committee was thereafter considered by the Board of Governors and the Board voted to affirm the opinion of the review committee and disallow any change in appellant's score. Appellant then sought a writ of mandamus directing the Board of Governors of the Washington State Bar Association to refer appellant to the Supreme Court of Washington as entitled to practice law. The Superior Court granted summary judgment in favor of the Board of Governors and the Supreme Court affirmed on the basis that the Bar Association had sufficiently established the general fairness of the bar examination and that appellant had not presented any facts indicative of arbitrariness.

ARGUMENT

The issues in the present case are uniquely narrow, and no amount of strained semantics can convert them into ones warranting review by this Court. The appellant purports to raise five separate questions. Appellee will deal with these five questions as follows:

1. Was the appellant denied any right, privileges, or immunitities secured by the Constitution of the United States without due process? (Questions 3, 4, 5, and 6 of appellant's jurisdictional statement)

2. Do the techniques or procedures used by the appellee in testing the qualification of applicants for admission to the State Bar raise any substantial federal questions? (Questions 1 and 2 of appellant's jurisdictional statement)

I.

Appellant Has Not Been Denied Any Constitutional Rights Cognizable Under the Fourteenth Amendment to the Constitution of the United States

The appellant maintains that the statute which authorizes the Board of Governors of the Bar Association to adopt rules, subject to the approval of the Supreme Court, fixing the qualifications, requirements and procedure for admission to the practice of law is unconstitutionally vague. Beyond that bare ascertion, appellant does not argue further. The Supreme Court concluded that the Washington State Bar Association had established the general fairness of the bar examination and that appellant had not presented any facts indicative of arbitrariness. (*Hooban v. Bd. of Governors*, 85 Wn.2d 774, 780, 539 P.2d 686, 690.) The Court noted numerous safeguards employed by the Bar Association to guard against human error or arbitrary or capricious action. For example: Questions are assigned to the examiners who have been selected to serve on the panel several months in advance of the date of the examination. Ap-

proximately two months before the examination date, the examiners are required to submit their questions and outlines covering legal issues, or proposed answers, to a screening committee, the members of which analyze the questions and answers, examine them for a clarity of expression and adequacy, and return them to the examiners for revision or correction, pursuant to the recommendations of the screening committee. The examiners then bring the revised questions to a meeting of the full panel of the examiners, which goes over each question and subjects it to general discussion and criticism. Out of these questions, further corrections and changes are made, after which the questions go to the printers. Furthermore, uncontroverted affidavits submitted by the Bar Association indicate that it is the practice of the bar examiners participating in an examination to meet to review boarderline failures after all grades have been tabulated, but before the names of the applicants are matched with their examination numbers which have been individually sealed in envelopes. In some instances, where increases in the essay grades are, in the judgment of the examiners, merited, an applicant may be passed. In the case of the appellant, it would have required an increase in one-third of his essay questions to bring his combined score to the passing mark.

This notwithstanding, at the request of the appellant, his grades were reviewed by a review committee composed of three experienced members of the committee of law examiners who did not participate in the February 1974 bar examination. After the appellant's previous scores had been obliterated, this committee made a review of each of the appellant's answers and assigned grades independently. The grades so assigned by the review panel totaled

one point less than the original grades assigned to the appellant's test. The review committee determined that the grade assigned the appellant was fair and that there was no basis for changing it.

Contrary to appellant's allegations that bar examinations are, in general, arbitrary, carpricious, not significantly related to job performance, and that the bar examination system operates in a manner which denies appellant his constitutional rights, the February 1974 bar examination was produced with great care by practicing attorneys for the purpose and with the effect of determining whether the appellant was qualified for the practice of law. It was administered and graded fairly, conscientiously, and impartially.

Appellant's argument that respondent has imposed a de facto residence requirement which denies him his right to travel is fallacious. The Supreme Court said on page 776:

> "No such residency requirements are necessary to take the Washington Bar examination and no other factor has been alluded to which would impermissibly impinge upon the right to travel."

Carried to its logical extreme, appellant's argument would have the Bar Association administer examinations to applicants when it is most convenient to the applicant. In that there are over 1,000 applicants per year, such a requirement would, obviously, be untenable.

Next, appellant argues that his process rights were denied by the trial court's refusal to allow discovery of the multi-state examination materials. The appellant states that the Supreme Court noted in a footnote that appellant was severely prejudiced by the limitations placed upon his

discovery. This statement is misleading when viewed in the context of appellant's argument concerning the denial by the trial court to allow discovery of the multi-state examination materials. The Supreme Court's footnote does not discuss discovery of the multi-state materials but limits its discussion to discovery of some of the essay exam materials. Nor does the Court state that appellant was severly prejudiced by the limitations placed upon his discovery. The Court did say on page 775:

> "The multi-state portion of the examination, however, apparently was not reviewed and appellant has not convinced us that it should have been reviewed."

In fact, the Bar Association is not allowed to retain copies of the multi-state examination under the rules of the National Conference of Bar Examiners. Thus the Bar Association did not have the multi-state materials requested by appellant. Furthermore, we agree with the Court in *Whitfield v. Illinois Board of Law Examiners,* 504 F.2d 474 (7th Circuit 1974) when that court stated, in a case similar to this one:

> "Furthermore, merely seeing his exam or comparing it with others would not allow plaintiff to expose errors or discern his abilities. These procedural rights would be virtually meaningless unless plaintiff also was able to confront the bar examiners and obtain from them explanations of their grades . . . Requiring an explanation for each of these applicants would place an intolerable burden upon the bar examiners. It also would place at an unfair disadvantage those applicants who were taking the exam for the first time." (p. 478)

Finally, the appellant urges that the law was misconstrued by the Court below. He states that there is a "right to travel" problem involved herein. As discussed, above, there is no residency requirement in the State of Washington to be eligible to sit for the bar examination and consequently appellant's "right to travel" argument is groundless. Appellant also argues that *Griggs v. Duke Power Company,* 41 U.S. 424 (1971) is applicable to the case at bar. The Supreme Court concluded on page 776:

> "Finally, *Griggs v. Duke Power Company,* supra, is not relevant since it involved impermissible racial discrimination in employment tests violative of the Civil Rights Act, 42 USCA § 2000 E-2 (1964). Herein, there has not even been an allegation of racial discrimination in the conduct or operative effect of the Washington Bar examination nor is there anything in the record supportive of such a possibility."

The instant case is in no way analogous to *Griggs* and no amount of strained reasoning can make it so. Once again, the appellant's unsupported allegation that the Washington State Bar examination is not a test of his ability to practice law is asserted. Beyond that, appellant does not further his contention. On the other hand, appellee has established that its tests are appropriately administered in order that it may recommend to the Supreme Court, with some assurance, that applicants to the Bar possess the requisite qualifications to advise and represent clients in legal matters.

II.

No Substantial Federal Question Is Presented

Upon analysis, the appellant raises only two arguments in support of his position that a substantial federal question is presented. First, it is contended that the use of a multiple choice bar examination encourages guessing and bares no rational connection to the appellant's ability to practice law. Second, it is contended that the essay portion of the Washington State Bar examination is administered in a manner which is manifestly unfair.

Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 238-239, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957), defines the extent of the federal concern as to the right to be admitted to practice law in a state:

> "A state cannot exclude a person from the practice of law or any other occupation in a manner or for reasons that contravene the due process or equal protection clause of the Fourteenth Amendment.
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> • • •
>
> "A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.
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> • • •
>
> "Even in applying permissible standards, officers of a state cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."

A. *The Multi-State Bar Examination Is a Rational Method of Testing Proficiency at the Law*

The use of multi-state bar examination was the result of an exhaustive and searching study of the entire bar examining process, initiated in 1967 by the National Conference of Bar Examiners. A committee was appointed to conduct the study, the members of which included bar examiners, law school deans, law school professors, and professional testing experts.

As a result of their studies, the committee recommended that the National Conference prepare a multi-state bar examination which would be made available to any of the states interested in using the examination. The examination which was developed is a multiple choice test, which consists of 200 questions. The questions consists of a statement of facts, which is not unlike that used in the typical essay question, followed by a number of questions, each of which may be answered by checking one of four answers. The applicant is directed to select the best of the four answers. The questions require a knowledge of the field of law examined in and the ability to analyze the fact situation in light of the legal questions and apply the law accurately, The test requires a high degree of discrimination and informed reasoning.

Justice Frankfurter, in his concurring opinion in *Schware supra*, said on page 248:

> "It is beyond this Court's function to act as overseer of a particular result of the procedure established by a particular state for admission to its bar . . . .Especially in this realm it is not our business to substitute our judgment for the state's judgment—for it is the state in all the panoply of its powers that is under review when the action of its Supreme Court is under review."

More recently, the Court of Appeals in *Whitfield, supra*, page 477 said:

> "Admission to practice in a state and before its courts is primarily a matter of state concern. And the determination of which individuals have the requisite knowledge and skill to practice may be properly committed to a body such as the Illinois Board of Law Examiners. *Douglas v. Noble*, 261 U.S. 165, 43 Sup. Ct. 303, 67 L.Ed. 590. A federal court is not justified in interfering with this determination unless there is proof that it was predicated upon a constitutionally impermissible reason. *Schware, supra*, 353 U.S. at 238-240; *id* at 248-249, 77 Sup. Ct. 752 (Frankfurter, J., concurring)."

The error underlying appellant's attack on the multi-state portion of the bar examination is the unfounded con-

clusion that because the applicant is directed to select the best of the four answers, the test is manifestly unfair because the applicant must guess which type of client the exam writer had in mind and rely in great part upon luck. In actuality, the questions are so structured that, although more than one of the four possible solutions may appear to be eligible answers, one of them is determinable, through careful analysis, to be the best answer, and that is the only answer for which an applicant receives credit. This is a reasonable and rational method of testing and does not violate due process.

B. *The Essay Portion of the Washington State Bar Examination Is Not Administered In an Unfair Manner*

In *Whitfield, supra*, on page 477, the Court of Appeals said:

> ". . . [a]s Justice Brandeis observed for a unanimous court in *Douglas v. Noble, supra*, 'It is not to be presumed that powers conferred upon the admission boards. . . . .' 261 U.S. at 170, 43 Sup. Ct. at 305. In this case, plaintiff has merely alleged, in essence, that an essay type examination requires subjective evaluation and that the standards of grading are not susceptible to precise definition. We agree with the Eighth and Ninth Circuits that such an allegation is not sufficient to state a claim for federal relief. *Feldman v. State Board of Law Examiners*, 438 F.2d 699, 705 (8th Circuit 1971); *Chaney v. State Bar of California*, 386 F.2d 962, 964-965 (9th Circuit 1967, sert. denied 390 U.S. 1011, 88 Sup. Ct. 1262, 20 L.Ed.2d 162."

The Washington Supreme Court noted that essay questions carry with them some degree of subjectivity and further noted that circumstances could arise where essay questions or the method of grading them could be arbitrary and capricious. However, the Court held that there

was no evidence in the record indicative of arbitrary or capricious action and held that the general fairness of the bar examination had been sufficiently established. (85 Wn. 2d 774, 778)

Every precaution is made to keep the bar examination utterly fair, impartial, and impersonal. If the bar association is to be charged with responsibility for the conduct and performance of practicing attorneys, it must have adequate control over the admission of these attorneys to the practice of law.

CONCLUSION

Wherefore, appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Washington.

Respectfully submitted,

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